

Submitted

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. [REDACTED] 278

JAMES H. BLUNDELL, EXECUTOR OF THE LAST WILL
AND TESTAMENT OF PATSY PAFF, DECEASED;
JAUNITA BLUNDELL, OLETA BLUNDELL, ET AL.,
ETC., PLAINTIFFS IN ERROR,

v.

WILLIAM R. WALLACE

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED FEBRUARY 2, 1924

(30,000)

90 P

(30,088)

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1923

No. 788

JAMES H. BLUNDELL, EXECUTOR IN THE LAST WILL
AND TESTAMENT OF PATSY PAFF, DECEASED;
JAUNITA BLUNDELL, OLETA BLUNDELL, ET AL.,
ETC., PLAINTIFFS IN ERROR,

v.s.

WILLIAM R. WALLACE

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA -

INDEX

	Original	Print
Proceedings in supreme Oklahoma.....	a	1
Return to writ of error(omitted in printing)...	a	
Citation and service...(omitted in printing)...	1	
Petition for writ of error.....	2	1
Assignment of errors.....	5	3
Order allowing writ of error.....(omitted in printing)...	7	
Writ of error.....	8	4
Petition in error.....	10	5
Case-made in district court of Garvin County.....	13	7
Petition	15	7
Plaintiffs' Exhibit E—Warranty deed from K. B. Welch et al. to W. R. Wallace.....	22	11
Exhibit C—Last will and testament of Patsy Poff....	24	12
Summons and sheriff's returns... (omitted in printing)...	28	
Answer of Patsy Blundell.....	34	13
Answer of Juanita Biundell et al.....	35	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 9, 1924

542993

INDEX

	Original	Print
Answer of James H. Blundell, executor.....	40	16
Application for appointment of guardian ad litem (omitted in printing).....	42	
Order appointing guardian ad litem (omitted in printing).....	44	
Agreed statement of facts.....	47	17
Judgment	50	10
Motion for new trial.....(omitted in printing) ..	57	
Order overruling motion for new trial (omitted in print- ing)	59	
Clerk's certificate.....(omitted in printing) ..	62	
Certificate and stipulation of attorneys (omitted in print- ing)	63	
Certificate of trial judge.....(omitted in printing) ..	66	
Submission of case.....(omitted in printing) ..	67	
Judgment	68	22
Opinion, Branson, J.....	71	23
Petition for rehearing.....(omitted in printing) ..	81	
Suggestions on petition for rehearing..(" " ") ..	83	
Order denying petition for rehearing..(" " ") ..	92	
Clerk's certificate.....(" " ") ..	93	
Stipulation as to printed record.....	94	29

[fol. a-2]

[File endorsement omitted.]

IN THE

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 12123

JAMES H. BLUNDELL, Executor of the Last Will and Testament of
Patsy Paff, Deceased; Jaunita Blundell, Oleta Blundell, and Patsy
Blundell, Minors, James H. Blundell, Legal Guardian of said
Minors, Plaintiffs in Error,

vs.

WILLIAM R. WALLACE, Defendant in Error

PETITION FOR WRIT OF ERROR—Filed January 18, 1924

To the Honorable Chief Justice of the Supreme Court of the State of Oklahoma:

Your petitioners herein, James H. Blundell, executor of the last will and testament of Patsy Paff, deceased, Jaunita Blundell, Oleta Blundell, and Patsy Blundell, minors, and James H. Blundell, legal guardian of said minors, respectfully show that on the 9th day of October, 1923, the Supreme Court of the State of Oklahoma rendered a judgment herein in favor of the defendant in error and against the plaintiffs in error in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of these petitioners, all of which more in detail appear in the assignments of error filed with this petition; that after the rendition of said judgment, and to-wit, on the — day of October, 1923, your petitioners herein filed a petition for rehearing in said cause, and that thereafter and to wit, on the 2nd day of November, 1923, an order was made by this court denying said petition for rehearing. Thereupon the opinion was filed in this cause by this court, affirming the judgment of the District Court of Garvin County, State of Oklahoma, which opinion is a part of the record in this cause, and your petitioners herein, the defendants below, respectfully show that there was a judgment in said cause in the District Court of Garvin County, State of Oklahoma, in favor of the defendant in error herein, and against your petitioners, decreeing that the defendant in error was the owner of an undivided one-third interest in certain lands, the allotment of Patsy Paff, deceased, described as the N. E. 4 of N. E. 4 of S. E. 4 of Sec. 12 township one north, range four west, and the W. [fol. 3] 2 of N. E. 4 of S. W. 4, and lots six and seven, and the S. E. 4 of S. W. 4 of Sec. 6, and the west 19.21 acres of lot one, section seven, township one north, range three west, and directing partition thereof, which said judgment upon appeal to the Supreme Court of the State of Oklahoma, was affirmed by said court, and,

Your petitioners herein further respectfully show that the said Supreme Court of the State of Oklahoma is the highest court in the State of Oklahoma in which a decision in said cause could be had, and your petitioners claim the right to remove said cause to the Supreme Court of the United States by writ of error under the Statutes of the United States of America authorizing writs of error to the Supreme Court of the United States, inasmuch as in said judgment of the Supreme Court of the State of Oklahoma, and the proceedings in said cause, certain errors were committed to the prejudice of your petitioners, all of which will in detail appear from the assignments of error filed with this petition, and because your petitioners claim in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in the rendition of its judgment, holding that section 8341 of the Revised Laws of the State of Oklahoma of 1910 controlled the making of the will of Patsy Paff, deceased, and was not in conflict with an Act of the Congress of the United States approved April 26, 1906, and especially section 23 thereof, the said Patsy Paff, being an Indian citizen, and a member of the Choctaw tribe of Indians, and at the time of her death, a resident citizen of the State of Oklahoma, and because the said Supreme Court of the State of Oklahoma erred in holding that the will executed by Patsy Paff, deceased, wherein she devised the property herein involved to the plaintiffs in error herein, was not valid and binding under said Act of Congress of April 26, 1906, entitled "An Act to provide for final disposition of the affairs of the Five Civilized Tribes of the Indian Territory, and for other purposes.

[fol. 4] Wherefore, your petitioners claim and says that by a final judgment in a suit in the highest court of the State of Oklahoma, in which a decision in said cause could be had, there was drawn in question the proposition of law as to whether or not the Act of Congress of April 26, 1906, entitled "An Act to provide for the final disposition of the Affairs of the Five Civilized Tribes of the Indian Territory, and for other purposes, controlled the making of the will of a member of said Five Civilized Tribes over a statutory provision of the Legislature of the State of Oklahoma, being section 8341 of the Revised Laws of 1910. And wherefore, and in accordance with the statutes in such case made and provided, your petitioners pray that a writ of error may issue in their behalf out of the Supreme Court of the United States for the correction of the errors, an assignment whereof is filed with this petition, and that a transcript of the record, proceedings, files, and papers in this cause, duly authenticated may be sent to the Supreme Court of the United States, and your petitioners pray for the allowance of a citation in due form of law, and your petitioners will ever pray.

James H. Blundell, Executor of the Last Will and Testament of Patsy Paff, Deceased; Jaunita Blundell, Oleta Blundell, and Patsy Blundell, Minors; James H. Blundell, Legal Guardian of said Minors, Petitioners, by Reford Bond, Alger Melton, Adrian Melton, Their Counsel.

[fol. 5]

[File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 18, 1924

Comes now James H. Blundell, executor of the last will and testament of Patsy Paff, deceased, Jaunita Blundell, Oleta Blundell, and Patsy Blundell, minors, and James H. Blundell, legal guardian of said minors, plaintiffs in error in the above entitled cause, and respectfully shows that in the trial of said cause and in the rendition of the judgment of the trial court, and in the opinion and judgment of the Supreme Court of the State of Oklahoma in said cause, manifest errors were committed to their prejudice, which are apparent from the record therein, that the errors committed by the trial court and affirmed by the Supreme Court of the State, and committed by the Supreme Court of the State in its opinion and judgment in said cause, are more fully and particularly set forth as follows:

1. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Garvin County, State of Oklahoma.

2. The Supreme Court of the State of Oklahoma erred in not reversing the judgment of the District Court of Garvin County, State of Oklahoma.

3. The Supreme Court of the State of Oklahoma erred in holding that section 8341 of the Revised Laws of 1910 of the State of Oklahoma were not in conflict with an Act of Congress of the United States of April 26, 1906, entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes."

[fols. 6 & 7] 4. The Supreme Court of the State of Oklahoma erred in holding that the will of Patsy Paff, deceased, was invalid and not sufficient in law to divest David Paff, the remote grantor of the defendant in error, William R. Wallace from all right, title and interest in the lands described in said will of the said Patsy Paff, deceased.

5. The Supreme Court of the State of Oklahoma erred in holding that under the Act of Congress of April 26, 1906, the said Patsy Paff, a member of the Choctaw tribe of Indians could not under said Act of Congress make a will of her lands that by its terms devised all of her real estate to persons other than her husband, David Paff, as provided by section 8341 of the Revised Laws of 1910, of the State of Oklahoma,

For which errors the said James H. Blundell, executor of the last will and testament of Patsy Paff, deceased, Jaunita Blundell, Oleta Blundell, and Patsy Blundell, minors and James H. Blundell, legal guardian of said minors, plaintiffs in error pray that the said judgment of the Supreme Court of the State of Oklahoma and the District Court of Garvin County, State of Oklahoma, be reversed and judgment rendered in favor of these plaintiffs in error, and for such other and further relief as to the court may seem just and proper, and for their costs.

James H. Blundell, Executor of the Last Will and Testament of Patsy Paff, Deceased; Jaunita Blundell, Oleta Blundell, and Patsy Blundell, Minors, and James H. Blundell, Legal Guardian of said Minors, by Reford Bond, Alger Melton, Adrian Melton, Attorneys for Plaintiffs in Error.

[fol. 8]

[File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Title omitted]

WRIT OF ERROR—Filed January 18, 1924

UNITED STATES OF AMERICA, &c.

The President of the United States of America to the Honorable Judges and Clerk of the Supreme Court of the State of Oklahoma. Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said Court before you, or some of you, being the highest court of law or equity in said state, in which a decision could be had in said suit between James H. Blundell, executor of the last will and testament of Patsy Paff, deceased, Jaunita Blundell, Oleta Blundell and Patsy Blundell, minors, and James H. Blundell, legal guardian of said minors, plaintiffs in error and William R. Wallace, defendant in error, in the Supreme Court of said state, wherein a judgment was rendered in said court on the 2nd day of November, 1923, in favor of said defendant in error, and against the plaintiffs in error, and wherein, was drawn in question the validity of a treaty, or statute, of, or an authority exercised under the laws of the United States, and the decision was against their validity; and wherein was drawn in question the validity of a statute, of or an authority exercised under the laws of said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of their validity; and it therein appears that manifest error hath happened, to the great damage of said plaintiff in error, as by his complaint, petition and assignment of errors appears:

[fol. 9] We, being willing that error, if any hath been, should

be duly corrected and fully and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington, D. C. within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to laws and customs of the United States should be done.

Witness the Honorable Wm. H. Taft, Chief Justice of the Supreme Court of the United States, this 18th day of January, 1924.

Harry L. Finley, Clerk United States District Court for Western District of Oklahoma. (Seal U. S. District Court.)

Approved and allowed by the Honorable J. T. Johnson, Chief Justice of the Supreme Court of the State of Oklahoma, this 18th day of January, 1924.

J. T. Johnson, Chief Justice Supreme Court of Oklahoma.

Attest: Wm. M. Franklin, Clerk Supreme Court of State of Oklahoma, by Reuel Haskell, Jr., Asst. (Seal of Supreme Court, State of Oklahoma.)

[fol. 10] [File endorsement omitted.]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Title omitted]

PETITION IN ERROR—Filed March 15, 1921

The said James H. Blundell, executor of the last will and testament of Patsy Poff, deceased, Jaunita Blundell Oleta Blundell, minors and James H. Blundell, legal guardian of said minors, complain of W. R. Wallace, defendant in error, for that the said W. R. Wallace at the January term of the District Court within and for Garvin County, State of Oklahoma received over judgment by the consideration of said court against the said James H. Blundell executor of the last will and testament of Patsy Poff, deceased, Jaunita Blundell, Oleta Blundell and Patsy Blundell minors, James H. Blundell legal guardian of said minors, in a certain action then pending in the said court, wherein the said W. R. Wallace was the plaintiff and the said James H. Blundell, executor of the last will and testament of Patsy Poff, deceased, Jaunita Blundell, Oleta Blundell, minors, James H. Blundell legal guardian of said minors were defendants. Certified transcript of the record of said court and

the original casemade duly certified and attested is hereto attached, marked "Exhibit A" and made a part of this petition in error.

And the said James H. Blundell, executor of the last will and testament of Patsy Poff, deceased, Jaunita Blundell, Oleta Blundell, minors and James H. Blundell guardian of said minors aver that there is error in said record and proceedings in this, to-wit:

[fols. 11 & 12] 1. The said District Court of Garvin County, erred in overruling motion of the plaintiffs in error for new trial.

2. The said District Court of Garvin County, erred in holding as a matter of law that the rights of the plaintiff in error's decedent, Patsy Poff to make a will was controlled by Section 8341, Revised Laws 1910.

3. The said District Court of Garvin County, erred in holding that the will executed by the said Patsy Poff, deceased was not sufficient to convey and vest the fee title in the lands therein described to the said beneficiaries under said will.

4. The said District Court of Garvin County, erred in holding that the defendant in error's decedent, David Poff husband of Patsy Poff, deceased, was entitled to recover any interest in said land div-sted under the terms of sale will.

5. Said District Court of Garvin County, erred in refusing to render judgment in favor of the plaintiffs in error and against the defendant in error.

6. The said District Court of Garvin County, erred in rendering judgment herein in favor of the defendants in error and against the plaintiffs in error.

Wherefore, plaintiffs in error pray that the said judgment so rendered be reversed, set aside and held for naught and that a judgment may be rendered in favor of the plaintiffs in error and against the defendant in error upon the agreed statement of facts upon which this cause was tried and that the plaintiffs in error be restored to all rights which they have lost by reason of the rendition of said judgment by said District Court of Garvin County, Oklahoma, and for such other relief as the plaintiffs in error may be entitled to receive.

Bond, Melton & Melton, Counsel for Plaintiffs in Error.

[fols. 13 & 14] IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

[Title omitted]

Case Made—Filed in District Court March 10, 1921; Filed in Supreme Court March 15, 1921

[File endorsement omitted.]

[fol. 15] IN THE DISTRICT COURT FOR GARVIN COUNTY

[Title omitted]

PETITION—Filed June 29, 1920

Comes now the plaintiff, W. R. Wallace, and represents and shows to the Court that he is a resident of Garvin County, Oklahoma, and that the lands hereinafter referred to, or the major portion of same are situated within the said County; that the defendants, James H. Blundell, Executor of the last will and testament of Patsy Poff, deceased, Juanita Blundell, Oleta Blundell and Patsy Blundell, are each residents of said County; that the defendant, James H. Blundell, is the duly appointed, qualified and acting executor of the estate of Patsy Poff, deceased, having been appointed such executor on the 18th day of September, 1916 by the County Court of Garvin County, Oklahoma.

Count One

For cause of action against said defendants, and each of them, plaintiff states that Patsy Poff was a duly enrolled Choctaw Indian of one half blood, enrolled opposite roll number 315 on the rolls of said tribe as prepared by the Commission and Commissioner to the Five Civilized Tribes, and as such allottee she was allotted as a portion of her distributive share of the lands of the said tribes the following described lands, to-wit:

[fol. 16] The Northeast Quarter of the Northeast Quarter of the Southeast Quarter of Section 12, Township 1 North, Range 4 West in Stephens County, Oklahoma, being a portion of her allotment other than a homestead.

The West Half of the Northeast Quarter of the Southwest Quarter; Lots 6 and 7 and the Southeast Quarter of the Southwest Quarter of Section 6, and the West 19.20 acres of Lot 1 of Section 7, all in Township 1 North, Range 5 West in Garvin County.

said lands having been allotted to her as her homestead allotment.

That patents were duly issued to her conveying said lands to her on the — day of —, 19—; that copies of said patents are hereby attached marked "Exhibits A and B" respectively and made a part hereof.

Plaintiff says that on the 17th day of August, 1916 the said Patsy Poff died testate, a resident of Garvin County Oklahoma, seized and possessed of the above described lands, and that thereafter and on September 5, 1916, a petition for the probate of said will was duly filed in the County Court of Garvin County, Oklahoma by James H. Blundell, the executor named therein; that thereafter on the 18th day of September, 1916, said will was duly admitted to probate as the last will and testament of the said Patsy Poff, deceased, and the said James H. Blundell was duly appointed as executor of said will and since said time has acted in said capacity, and is now such executor; that a copy of said will is hereto attached marked "Exhibit C" and made a part hereof.

Plaintiff says that the said Patsy Poff, deceased, left at her death [fol. 17] a surviving husband, whose name was David H. Poff and that the said Patsy Poff and David H. Poff were duly and legally married prior to 1898, and that the said David H. Poff at the time of the death of the said Patsy Poff was the legal husband of the said Patsy Poff; that under the terms and provisions of said will as set out in the third paragraph thereof the said Patsy Poff, gave, devised and bequeathed unto the said David H. Poff, the sum of \$5.00; that the value of the estate left by the said Patsy Poff at the time of her death was several thousand dollars; that the said Patsy Poff was without authority by reason of Section 8341 of the Revised Laws of 1910, of the State of Oklahoma to devise and bequeath to persons other than the said David H. Poff more than two thirds of the property of which she died seized and possessed; that said sum of \$5.00 is far less than one third of the value of the estate left by the said Patsy Poff, deceased, and that said will was inoperative and void as to the said David H. Poff and that upon the death of the said Patsy Poff, there was vested in the said David H. Poff by inheritance and undivided one third interest in fee simple to the lands above described; that the above described property was acquired during the coverture of the said Patsy Poff with the said David H. Poff.

Plaintiff says that thereafter and on the — day of —, 1918, the said David H. Poff died, a resident of Oklahoma County, Oklahoma, testate, seized and possessed of an undivided one third interest in and to the above described lands, as above set out, and that thereafter Katherine Bailey was duly appointed by the County Court of Oklahoma County, as Administratrix with the will annexed of the [fol. 18], estate of said David H. Poff, deceased that under and by virtue of the terms of said will Katerine Bailey was the sole devisee and legatee under said will and became possessed of all the right, title and claim and interest of the said David H. Poff in and to the lands above described; that a copy of said will is hereto attached and marked "Exhibit D" and made a part hereof; that thereafter and on the — day of June, 1920, the said Katerine Bailey, joined by her husband — Bailey, made, executed and delivered to this plaintiff, W. R. Wallace, a warranty deed conveying all the right, title, interest and estate inherited by the said David H. Poff, and devised to the said Katerine Bailry in and to the above described lands; that a copy of said deed is hereby attached marked "Exhibit E" and made a part

hereof; that by virtue of said conveyance this plaintiff is now the owner of an undivided one third interest in and to the lands above described.

Plaintiff says that notwithstanding the fact that said will is void and imperative as against this plaintiff and his grantors hereinabove set out, the defendants above named deny plaintiff's interest in and to said lands and refuse to recognize the same; that the claims of said defendants under and by virtue of said will constitute a cloud upon plaintiff's title which plaintiff is entitled to have removed by order of this Court.

That the claim of said defendant, Patsy Blundell, if any, are unknown to this plaintiff.

Wherefore, plaintiff prays that defendants and each of them be cited to appear herein, and that they and each of them be required [fol. 19] to set up whatever claims they have, if any, in and to said lands, and that upon a final trial her-of, the Court render judgment, decreeing and holding inoperative invalid and void the provision of said will, so far as the same appears to vest the said David H. Poff of any interest in and to said lands; that the title of this plaintiff be decreed to be a fee simple title in and to an undivided one third interest in the above described lands, and that said title be quieted as against said will and the claims of said defendants, and each of them, and that said defendants and each of them be forever perpetually restrained and enjoined from asserting any right, title, claim, or interest in and to said lands as to said undivided one third interest adverse to the right, title, claim and interest of this plaintiff therein, and for such other and further relief with costs hereon expended as plaintiff may show himself entitled to receive in the premises.

Count Two

And as a further cause of action against the said defendants and each of them, plaintiff states that he hereby adopts and makes a part of this count all the allegations and statements of fact hereinbefore set out in Count One, the same as if copied at length herein.

Plaintiff says that said lands are held in common and undivided by himself, and the defendants, Juantia Blundell and Oleta Blundell; that he owns an undivided one third interest therein and that each of said last named defendants owns an undivided one third interest therein.

Plaintiff says that the defendant, James H. Blundell as executor of [fol. 20] the last will and testament of Patsy Poff, deceased is in possession of said lands as such executor, only for the purpose of administering said estate; that all the obligations of said estate have been fully paid and that on the 15th day of October, 1917, the said James H. Blundell filed a final report in the County Court of Garvin County, Oklahoma, in the matter of said estate showing the full payment of all claims against said estate and praying for an order of distribution therein; that the further possession of said estate by the said James Blundell as executor, by reason thereof is unnecessary.

Whereof, plaintiff prays in addition to the prayer set out in Count One hereof that the Court decree the interest of the owners in said lands, and that the Court partition the same according to such respective interests, and for such other and further relief with costs as plaintiff may show himself entitled to receive in the premises.

Count Three

And as a further cause of action herein, plaintiff adopts all the allegations and statements of fact, made or contained in Counts One and Two of this petition, the same as if copied at length herein.

Plaintiff further says that said defendant, James H. Blundell, as such executor is in possession of said lands; that plaintiff is the owner of an undivided one third interest therein and is entitled to the immediate possession of same; that this plaintiff, Juanita Blundell and Oleta Blundell are co-tenants of said lands and that James H. Blundell is in possession thereof as executor only for the administration of said estate and the payment of debts, which debts have long [fol. 21] since been paid; that possession thereof has been demanded, but the said defendant fails and refuses to surrender possession to this plaintiff as such co-tenant.

Wherefore, premiese, considered, plaintiff prays that he have judgment for possession of said lands and for such other and further relief with costs as he may show himself entitled to receive in the premises.

Count Four

And as a further cause of action plaintiff adopts all the allegations and statements of fact made or contained in Counts One, Two and Three of this petition, the same as if copied at length herein.

Plaintiff further says that the defendant James H. Blundell, as such executor, has been in possession of said lands since 1916 and has been collecting the rents, revenues and profits arising therefrom; that he has wholly failed and refused to account to this plaintiff or to the grantors of the plaintiff for said rents, revenues and profits; that same amount to the sum of \$500.00 for each year for the years 1916, 1917, 1918, 1919, and 1920, or a total sum of \$2,500.00; that this plaintiff is the owner of and entitled to said rents under and by virtue of a written assignment therefrom from the said Katherine Bailey, a copy of which said written assignment is hereto attached, marked "Exhibit F" and made a part hereof.

Wherefore, premises considered plaintiff prays that he have judgment against said defendant, James H. Blundell as such executor in the sum of one third of said total rents, or the sum of \$833.33 1/3, [fol. 22] for the rents for said years, and for all costs herein laid out and expended and all other and further relief to which he may show himself entitled in the premises.

Blanton, Andrews & Osborn, Bowling & Farmer, Attorneys for Plaintiff.

EXHIBIT E TO PETITION

Warranty Deed

Know all men by these presents, that Katherine Bailey Welch and her h-sband William Earl Welch of Oklahoma County, State of Oklahoma parties of the first part, in consideration of the sum of One Thousand Dollars in hand paid the receipt of which is hereby acknowledged do hereby grant, bargain, sell and convey unto W. R. Wallace of Garvin County, State of Oklahoma, party of the second part, the following described real property and premises, situated in Garvin and Stephens County, State of Oklahoma, to-wit:

The West half ($\frac{1}{2}$) of the Northeast Quarter (N. E. $\frac{1}{4}$) of the Southwest Quarter (S. W. $\frac{1}{4}$) and Lot Six (6) and Lot Seven (7) and the Southeast Quarter (S. E. $\frac{1}{4}$) of the Southwest Quarter (S. W. $\frac{1}{4}$) all in Section Six (6) and, the West 19 and 20/100 acres of Lot One (1) Section Seven (7) all in Township 1, North, Range Three (3) West, and the Northeast Quarter (N. E. $\frac{1}{4}$) of the Northeast Quarter (N. E. $\frac{1}{4}$) of the Southeast Quarter (S. E. $\frac{1}{4}$) of Section 12, Township 1 North, Range Four (4) West, containing 167 and 50/100 acres more or less together with all the improvements thereon and the appurtenances thereunto belonging and warrant the title to the same.

To have and to hold said described premises unto the said party [fol. 23] of the second part his heirs and assigns forever, free, clear and discharged of, and from former grants charges, taxes, judgments, mortgages and other liens and incumbrances of whatsoever nature.

Signed and delivered this 16 day of June, 1920.

Katherine Bailey Welch, William Earl Welch,

(Documentary Stamp \$1.00)

STATE OF OKLAHOMA,
Oklahoma County:

Before me, a Notary Public, in and for the said County and State, on this 16th day of June, A. D. 1920, personally appeared Katherine Bailey Welch and William Earl Welch to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and official seal, the day and date above written.

M. C. Jay, Notary Public. My commission expires 1st day of
April, 1924. (Seal.)

(Indorsed)

STATE OF OKLAHOMA,
Garvin County, ss:

This instrument was filed for record on the 17 day of June, 1920,
at 10:30 o'clock A. M. and duly recorded in deed record — on page
— Fee, —.

Harry Oliphant, County Clerk, by E. Westbrook, Deputy.

EXHIBIT C TO PETITIONS

U. S. A., S. OF OKLAHOMA,
Co. of Grady:

Last Will and Testament of Patsy Poff

In the name of God, Amen.

I, Patsy Poff, of full age, realizing thee uncertainty of life and the certainty of death, being of sound and disposing mind and memory but in feeble bodily health, and desiring to dispose of my worldly affairs while I have the strength to do so, and to that end do make, sign, publish and declare this instrument to be my last will and testament, hereby revoking all other wills, or parts of wills, by me as heretofore made.

First. After death I desire that my body be given decent Christian burial according to the rites of Church and with such expenses as are or shall be compatible with the financial condition of my estate, and I so direct.

Second. I further direct that all my just debts, and expenses of last illness and funeral expenses be paid as promptly as the condition of my estate will permit and I hereby direct and empower my executor to dispose of sufficient personal property, if I leave so much, if not, then of real estate, to pay said debts and expenses without unnecessary delay.

Third. I give, devise and bequeath to my husband, David H. Poff, the sum of Five Dollars.

Fourth. I give, devise and bequeath unto each of my grandchildren, namely; Jane Monerief, Lee Monerief, Georgie Monerief, Patsie Blundell (nee Mann) the sum of Five Dollars each, and to the heirs of Perry H. Blakely, deceased, the sum of \$5.00.

[fol. 25] Fifth. To my great grand daughters namely, Juanita Blundell and Oleta Blundell, if they survive me, if not to their mother, Patsy Blundell, if she should fail to survive me, then to the living heirs of Patsy Blundell, I hereby give devise and bequeath in fee, the remainder of my property, real and personal, with all rights, choses in action, claims, credits, sums of money due or to become due from the United States government or any Indian

Tribes or Nations, by reason of any annuity, treaty, sale of lands, minerals, oils, mines, timbers or any and all whatsoever, and all other property rights whatsoever, which I may own or possess or be entitled to at my death, or thereafter accruing.

Sixth. I hereby appoint James Blundell the executor without bond of this my last will and testament with power in him to execute the provisions herein and direct that same be executed as soon as practicable after my death and hereby grant him all power and authority necessary to carry out and perform the provisions hereof.

In testimony -herein I have hereunto set my hand and affixed my seal, unsing a scroll for a seal, at Rush Springs Grady Count-, Oklahoma, this the 26th day of November, 1912.

Patsy Poff (her X mark).

I, Ed Coyle, of Rush Springs, Okla., a Notary Public in and for the above named County and State, did on this the 26th day of November, 1912, at the request of Patsy Poff, sign her name to the foregoing will in her presence and in the presence of subscribing witnesses.

Ed Coyle.

Formal execution omitted.

[fols. 26-33] [File endorsement omitted.]

[fol. 34] IN THE DISTRICT COURT OF GARVIN COUNTY

[Title omitted]

SEPARATE ANSWER OF PATSY BLUNDELL

Comes now Patsy Blundell, one of the defendants in the above styled and entitled cause and for her answer to the petition of the plaintiff herein filed, says that she adopts all of the answer of her co-defendants Oleta Blundell and Juanita Blundell, as her answer herein and prays that the plaintiff take nothing, and that she be discharged with her costs.

Bond, Melton & Melton, Counsel for Defendant Patsy Blundell.

[fol. 35] IN THE DISTRICT COURT OF GARVIN COUNTY

[Title omitted]

SEPARATE ANSWER OF JUANITA BLUNDELL AND OLETA BLUNDELL,
MINORS

Comes, now Juanita Blundell and Oleta Blundell, minors by their guardian James H. Blundell and Adrian Melton guardian ad litem, and for answer to the petition of the plaintiff herein filed, say:

I

These answering defendants allege that they and each of them are minors, and that James H. Blundell is their legal guardian and that such guardianship is now in full force and effect, and is pending in the County Court of Garvin County, Oklahoma.

II

For answer to plaintiff's petition herein these defendants say that they admit that Patsy Poff was a duly enrolled Choctaw Indian, of one half Indian blood, enrolled opposite No. 315, on the approved rolls of said tribe and admit that there was allotted and patented to said Patsy Poff during her life time the lands in the first paragraph of the plaintiff's petition described, located in Stephens and Garvin Counties, Oklahoma, and admit that the patents were issued to said allottee conveying to her said lands as in said petition alleged, and [fol. 36] admit that the copies attached to plaintiff's petition are true and correct copies of the same.

These answering defendants admit that on the 17th day of August, 1916, the said Patsy Poff, died testate, a resident of Garvin County, Oklahoma, seized and possessed of said lands, and that thereafter and on September 5th, 1916, petition was filed for the probate of the will of said Patsy Poff, deceased, and that James H. Blundell was the executor named in said will, and that on the 18th day of September, 1916, said will was duly admitted to probate and duly established as and for the last will and testament of the said Patsy Poff, deceased, and that the said James H. Blundell was, in pursuance of law, appointed executor of said will; and that he has ever since said time acted as such executor; and that the copy of said will attached to the said plaintiff's petition, marked Exhibit "C" is a true and correct copy of said will.

These defendants further admit that at the time of the death of said Patsy Poff, deceased, she left surviving her a husband, whose name was David H. Poff, and admit that the said David H. Poff and the said Patsy Poff were duly married as in said petition alleged, and that the said Patsy Poff, and David H. Poff, although separated, were husband and wife at the time of the death of the said Patsy Poff. These defendants for further answer say, that they admit that the estate and property bequeathed to them under said will was of a value far in excess of the sum of \$5.00.

For further answer herein these defendants say that they admit that one Katherine Bailey, who claimed to be an heir at law of the said David H. Poff, executed and delivered to the plaintiff herein a [fol. 37] warranty deed, attempting to convey to the said plaintiff all interest that David H. Poff, had in and to lands of the said Patsy Poff, deceased and admit that the copy of the deed attached to the plaintiff's petition is a true and correct copy of same.

These answering defendants say that they deny each and every, all and singular the other affirmative allegations set up and contained in plaintiff's petition and demand strict proof of same.

III

For further answer herein, and by way of defense to the plaintiff's petition, these defendants say that said petition upon its face wholly fails to state any cause of action in favor of the plaintiff and against the defendants, and say that if all of the allegations contained in said petition are true that then plaintiff is not entitled to recover herein.

IV

These defendants say that by the last will and testament of the said Patsy Poff, deceased, they acquired the simple title to the lands in plaintiff's petition described, to the exclusion of the plaintiff and all persons claiming by, thru, or under the said David H. Poff, deceased, and they here and now specially plead said will and the complete probate thereof, as a defense, to the alleged cause of action relied upon by the plaintiff, and they here and now refer to and make a part of this answer all of the proceedings in the County Court of Garvin County, Oklahoma, in cause No. 1138 pertaining to the probate of the will of said Patsy Poff, deceased, part of this answer, the same as thought such proceedings and each of them were [fol. 38] set out herein verbatim.

V

For further answer if need be, these defendants say that Section 8341 of the Revised Laws of 1910, of the State of Oklahoma, specifically plead by the plaintiff in the first paragraph of his petition does not apply or control or in any way affect the right of a citizen of the Five Civilized Tribes to dispose of the lands allotted to them by will, but that the Act of Congress of April 26, 1906, being Section 23, and the amendments to such Act of Congress, as is contained in the Act of July 27, 1908, control the right of the said Patsy Poff to dispose of said lands by will and in so far as said Section 8341 is any way conflicts with the said Act of Congress, such Act is void and cannot be enforced; that the said David H. Poff, his heirs and assigns, and the said plaintiff herein, who claims to hold some right in and to said lands by reason of the conveyances plead, have acquired no interest whatever in the lands of which said Patsy Poff died seized, and that such conveyances are ineffective and void.

VI

For further and separate answer to paragraph two of the plaintiff's petition, these defendants make all of the above and foregoing answer part of this and answer to Count Two of plaintiff's petition and say in addition thereto that said County Two does not alleged and state any cause of action in favor of the plaintiff and against defendants.

VII

For answer to Count Three of the Plaintiff's petition defendants [fol. 39] say that they make all of the allegations contained in this their answer a part of this answer to Count Three of the said petition and in addition thereto they say that said County Three of said Petition of the plaintiff wholly fails to state a cause of action in favor of the plaintiff and against these defendants.

Wherefore, These defendants say that the said plaintiff herein is claiming some right title, interest and estate in and to said lands by reason of the deed under which he holds, and by reason of certain oil and gas lease made to him by the heirs of the said David H. Poff, deceased, but that such claims so asserted under said instruments is void, does not in law create any legal interest in said lands, but that the taking of said deed and oil leases and the conveyances so held by the said plaintiff casts a cloud upon the title of these defendants to said land and prevents these defendants from using and disposing of said lands, and constitutes a cloud on defendants title, and that said instruments of conveyance so made to the said plaintiff herein should be by judgment of this court cancelled, set aside, and held for naught, and the said W. R. Wallace and all person claiming by thru or under him should by judgment of this court forever barred and precluded from setting up or claiming any right, title, interest or estate in and to said lands, or any part thereof, adverse to the title acquired by these defendants under said will, and these defendants are entitled to recover their costs herein.

Bond, Melton & Melton, Counsel for Defendants Oleta Blundell, Juanita Blundell, and James H. Blundell, Their Legal Guardian, and Adrian Melton, Guardian ad Litem.

[fol. 40] IN THE DISTRICT COURT OF GARVIN COUNTY

[Title omitted]

SEPARATE ANSWER OF JAMES H. BLUNDELL, EXECUTOR OF THE LAST WILL AND TESTAMENT OF PATSY POFF, DECEASED

Comes now James H. Blundell, executor of the last will and testament of Patsy Poff, deceased, and for his separate answer herein hereby adopts and makes a part of his answer all of the allegations set up and contained in the answer of his co-defendants herein, Juanita Blundell and Oleta Blundell, and says that he specifically pleads such answer as his defense herein.

II

For further answer herein this defendant James H. Blundell, executor, says that he admits that he was appointed executor of the

said will and as such he has administered upon such estate; that he has collected the rents and revenues arising from said land, and that he has filed his final report as such executor in the office of the County Court of Garvin County, Oklahoma, that such report so filed by him is true and correct, and that the possession of the lands in said will described have been delivered to said minors. He admits that all of the claims against the estate of the said Party Poff have been paid, as is shown in his final report, and that the same were paid by this defendant from the proceeds arising from the rents [fols. 41-46] and revenues of the lands described in said will, and says that said plaintiff alleges no cause of action against this defendant herein.

III

For further answer herein if need be, this defendant says that the said petition of plaintiff herein filed and especially Count Three and Count Four of said petition allege no cause of action in favor of the plaintiff and against this defendant.

Wherefore, defendant having fully answered prays that the plaintiff take nothing by reason of this action and that he be discharged with his costs herein.

Bond, Melton & Melton, Counsel for Defendant James H. Blundell, Executor.

[fol. 47] IN THE DISTRICT COURT OF GARVIN COUNTY

[Title omitted]

AGREEMENT OF FACTS—Filed January 31, 1921

It is hereby agreed by and between counsel for plaintiff and counsel for defendants in the above styled and entitled case that this cause may be tried upon the following agreed statement of facts.

1. That Patsy Poff was a member of the Choctaw tribe of Indians of the one-half blood enrolled opposite No. 315, and that as such, there was allotted and patented to her the following described lands, to-wit:

The N. E. 4 of N. E. 4 of S. E. 4 of Sec. 12, township 1 north, range four west, and the W. 2 of N. E. 4 of S. W. 4, and lots 6 and 7, and the S. E. 4 of S. W. 4 of Sec. 6, and the west 19.21 acres of lot one, section seven, township one north, range three west.

2. That on the 17th day of August, 1916, the said Patsy Poff died testate, and at the time of her death, she was a resident of Garvin County, Oklahoma, and that she was seized and possessed of the lands hereinabove described at the time of her death; than on the

5th day of September, 1916, petition was, filed in the County Court by James H. Blundell, seeking to probate an instrument therein pro [fol. 48] pounded as and for the last will and testament of the said Patsy Poff, deceased; that the copy of the will attached to plaintiff's petition, marked Exhibit "C" is a true and correct copy of said will, and that on the 18th day of September, 1916, said will was duly admitted to probate as and for the last will and testament of said Patsy Poff deceased; that the said James H. Blundell, was duly appointed executor of said will.

3. That at the time of the death of the said Patsy Poff, deceased, she left surviving her a husband whose name was David H. Poff, and that they were married prior to the year 1898, and at the time of the death of the said Patsy Poff, deceased, she and the said David H. Poff were legally husband and wife; that the sum of \$5.00 as bequeathed to David H. Poff under the terms of said will did not amount to one-third of the property of which the said Patsy Poff died seized at the time of her death, but that the estate of the said Patsy Poff amounted to several thousand dollars.

4. That in the year 1918, the said David H. Poff, died a resident of Oklahoma County, Oklahoma; that Katherine Baily was duly appointed administratrix of his estate with will annexed; that the said Katherine Bailey was the sole devisee under said will, and was possessed of all the property owned and held by said David H. Poff at the time of his death.

5. That the said Katherine Bailey executed to the plaintiff her warranty deed to the lands described in plaintiff's petition.

6. That ever since the death of the said Patsy Poff, and since the appointment of the said James H. Blundell as executor of said will, the said James H. Blundell as executor has had possession of the lands involved in this action that Oleta Blundell and Juanita Blundell are claiming to own said lands by virtue of said will; that the said Patsy Blundell has no interest in said lands, nor does she claim any interest therein; that the only interest claimed by James H. Blundell is by virtue of his having been appointed executor of said estate under the will.

[fol. 49] 7. That the said Oleta Blundell and Juanita Blundell as the owners of said land are now in the possession of the same, and holding the same to the exclusion of the plaintiff; that the said James H. Blundell has been in possession of said lands since the date of the death of said Patsy Poff as executor of the will of Patsy Poff, deceased, and as guardian of Oleta Blundell and Juanita Blundell.

Blanton, Andrews and Osborne, Attorneys for Plaintiff.
Adrian Melton, Attorney for Defendants.

[fol. 50] IN THE DISTRICT COURT FOR GARVIN COUNTY

[Title omitted]

JUDGMENT—Filed January 31, 1921

On this the 31st day of January, 1921, the same being one of the regular days of this Court, the above cause came on for hearing, and the plaintiff appears in person and by his counsel and the defendant, James H. Blundell, appeared in person and by his attorneys, and it appearing that defendant, Patsy Blundell has filed a disclaimer herein, the said cause is dismissed as to her, and the defendants, Juanita Blundell and Oleta Blundell appear herein by their guardian ad litem, and counsel, and all persons having announced ready for trial, and a jury being waived, this cause is submitted to the court for judgment.

And the Court after hearing and considering all the evidence in said cause, and after having read the agreed statement of facts herein, and there being no further evidence offered by either party, the court finds:

That Patsy Poff was a member of the Choctaw Tribe of Indians of the one half blood enrolled opposite No. 315, and that as such there was allotted and patented to her the following described lands, to-wit:

The Northeast Quarter of the Northeast Quarter of the Southeast Quarter of Section 12, Township 1 North, Range 4 West, in Stephens [fol. 51] County, Oklahoma, being a portion of her allotment other than a homestead.

The West Half of the Northeast Quarter of the Southwest Quarter; Lots 6 and 7 and the Southeast Quarter of the Southwest Quarter of Section 6, and the West 19.20 acres of lot 1 of Section 7, all in Township 1 North, Range 3 West, in Garvin County, Oklahoma, said lands having been allotted to her as her homestead.

That on the 17th day of August, 1916, the said Patsy Poff, died testate, and at the time of her death she was a resident of Garvin County, Oklahoma, and that she was seized and possessed of the lands hereinabove described at the time of her death; that on the 5th day of September, 1916, petition was filed in the County Court by James H. Blundell, seeking to probate *ab* instrument therein propounded as and for the last will and testament of the said Patsy Poff, deceased; that the copy of the will attached to plaintiff's petition, marked Exhibit "C" is a true and correct copy of said will; and that on the 18th day of September, 1916, said will was duly admitted to probate as and for the last will and testament of said Patsy Poff, deceased; that the said James H. Blundell was duly appointed executor of said will.

That at the time of the death of the said Patsy Poff, deceased, she left surviving her a husband whose name was David H. Poff,

and that they were married prior to the year 1898, and at the time of the death of the said Patsy Poff, deceased, she and the said David H. Poff were legally husband and wife; that the sum of \$5.00 as bequeathed to David H. Poff under the terms of said will did not amount to one third of the property of which the said Patsy Poff died seized at the time of her death; but that the estate of the said Patsy Poff amounted to several thousand dollars:

[fol. 52] That in the year 1918, the said David H. Poff, died a resident of Oklahoma County, Oklahoma; that Katherine Bailey was duly appointed administratrix of his estate with will annexed; that the said Katherine Bailey was the sole devisee under said will, and was possessed of all the property owned by and held by the said David H. Poff, at the time of his death:

That the said Katherine Bailey executed to the plaintiff her warranty deed to the lands described in plaintiff's petition.

That ever since the death of the said Patsy Poff, and since the appointment of the said James H. Blundell, as executor of said will and the said James H. Blundell as such executor has had possession of the lands involved in this action; that Oleta Blundell and Juanita Blundell are claiming to own said lands by virtue of said will; that the said Patsy Blundell has no interest in said lands, nor does she claim any interest therein under said will; that the only interest claimed by James H. Blundell is by virtue of his having been appointed executor of said estate under the will.

That the said Oleta Blundell and Juanita Blundell as the owners of said land are now in the possession of the same, and holding the same to the exclusion of the plaintiff; that the said James H. Blundell has been in possession of said lands since the date of the death of said Patsy Poff as executor of the will of Patsy Poff, deceased, and as guardian of Oleta Blundell and Juanita Blundell.

[fol. 53] From the above finding of fact, it is hereby ordered, adjudged and decreed by the Court that the plaintiff herein, W. R. Wallace, is entitled to recover in this action as prayed for in his petition, and that the will of Patsy Poff, deceased attached to plaintiff's petition herein, and filed for probate in the County Court of Garvin County, Oklahoma, on the 18th day of September, 1916, be, and the same is hereby declared to be void in so far as the same pertains to the interest of the plaintiff herein, to all of which the said defendants, and each of them except and which exceptions are by the Court allowed.

It is further ordered, adjudged and decreed by the Court that the plaintiff herein do have and recover, and is hereby vested with the undivided one third interest in and to the above described real property and premises, and the title of plaintiff in and to an undivided one third interest in said real property and premises above described is hereby forever quieted and settled in the plaintiff as against all claims of the defendants, and each of them, and that the plaintiff do have and recover an undivided one third interest in all the other property of which the said Patsy Poff, may have died seized.

It is further ordered, adjudged and decreed by the Court that this action be, and the same is hereby dismissed as to the defendant, Patsy Poff, she having filed her disclaimer herein.

It is further ordered, adjudged and decreed by the Court that the said defendants, jointly with the plaintiff hold the fee title to said lands and that the said plaintiff herein has an undivided one third interest in said lands, and the defendants Juanita Blundell and Oleta Blundell, are the owners jointly with the plaintiff of the other undivided two thirds interest therein, each owning an undivided one third interest there, and that said lands are susceptible of partition and that three disinterested commissioners, to-wit: Walter L. [fol. 54] Hart, H. A. Gage and W. R. Bell be, and they are hereby appointed and designated by this Court to view said property and parti-on the same between the owners hereof share and share alike, and in the event said Commissioners should find that said property cannot be partitioned that they so find, and file a report in said Court showing such fact and return an appraisement of said property as provided by law.

It is further ordered, adjudged and decreed by the Court that the plaintiff do have and recover of and from the defendant possession of an undivided one third interest in and to the above described lands and premises.

It is further ordered, adjudged and decreed by the Court that the question of rents involved in this action, be and the same is hereby continued in this Court pending further action herein.

To all of which judgment, the defendants and each of them except, and their exceptions are by the Court allowed, and notice of appeal in this case is hereby given in open court, and same is now entered on the trial docket, to the plaintiff in this cause, and upon good cause shown the time in which the defendants shall have to serve case made herein, is by the court extended for a period of 30 days from this date, 5 days, thereafter is given in which to suggest amendments and such case may be settled and signed on three days' notice by either party.

It is further ordered, adjudged and decreed by the Court that the judgment herein be, and the same is hereby superseded for a period of ten days from this date upon the filing by the defendants herein of a good and sufficient supersedeas bond in the sum of \$1,000.00 conditioned, as provided by law, and upon the filing of said bond the judgment herein shall be superseded pending a decision hereof by the Supreme Court of the State of Oklahoma.

[fols. 55-67] W. L. Eagleton, Judge of the District Court

O. K. Blanton, Andrews & Osborn, Attys. for Plaintiff.
O. K. B. M. & M.

[File endorsement omitted.]

[fol. 68]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

JUDGMENT—October 9th, 1923

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Opinion by Branson, J.

Johnson, CJ., Harrison, Kane, Nicholson, Kennamer, and McNeill,
JJ., concur.

Cochran, J., dissents.

[fol. 69]

[File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

OPINION—Filed October 9, 1923

Syllabus

1. The Act of congress of April 26, 1906, entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes," provides in section 23:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein, provided that no will of a fullblood Indian should be valid if such last will and testament disinherits the parent, wife, spouse, or children of such fullblood Indian, unless acknowledged before and approved by a Judge of the United States Court for the Indian Territory, or a United States Commissioner."

This provision of the act of congress had for its purpose the further removal of restrictions from citizens of the Five Civilized [fol. 70] Tribes of Indians, and was not intended by congress as conferring an absolute right of disposition of his property without regard to the law of the State where the property is located.

2. Section 8341, R. L. Okla. 1910 provides;

"Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be dis-

posed of by will; Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband; Provided, further, that no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will."

Held: This provision is applicable to Indian citizens, as well as other citizens of the state.

3. Record examined, and held that the testatrix, Patsy Poff, could not convey her real estate allotted to her as a citizen of the Choctaw Nation by will executed in 1916, free — the provisions of section 8341, R. L. 1910.

[fol. 71]

Opinion

By BRANSON, J: This appeal is prosecuted to reverse a judgment obtained by the defendant in error against the plaintiffs in error in the district court of Garvin County, Oklahoma. The parties are referred to herein as they appeared in the lower court. The facts controlling the determination of the issues raised by the pleadings were stipulated, and were in substance, that Patsy Poff was a member of the Choctaw tribe of Indians of one-half degree of blood, and that she was allotted the land in question, to-wit, the homestead, and 10 acres of the surplus allotment as a citizen of the Choctaw nation, and died seized thereof, on the 7th day of August, 1916, a resident of Garvin County. That the said Patsy Poff left surviving her husband, David H. Poff, and that prior to her death, she had executed a will devising her said homestead and 10 acres of surplus to the defendants. That said will bequeathed to David H. Poff the sum of \$5.60, which did not amount to one-third of the property of which the said Patsy Poff died seized, the said estate of the said Patsy Poff being worth several thousand dollars.

Judgment for one-third of the land was entered in favor of plaintiffs, following the state statute.

From the judgment of the district court the plaintiffs in error appeal, and make various assignments. The only assignments necessary to be discussed, however, as we view the case are assignments 2, 3 and 4, which are:

"2. The said District Court of Garvin County, erred in holding as a matter of law that the rights of the plaintiff in error's decedent, Patsy Poff to make a will was controlled by Section 8341, R. L. 1910.

[fol. 72] "3. The said District Court of Garvin County, erred in holding that the will executed by the said Patsy Poff deceased, was not sufficient to convey and vest the fee title in the lands therein described to the said beneficiaries under said will.

"4. The said District Court of Garvin County erred in holding that the defendant in error's decedent, David H. Poff, husband of Patsy

Poff, deceased, was entitled to recover any interest in said land divested under the terms of said will."

The question of law involved in this appeal is whether or not the limitations contained in section 8341 R. L. 1910 controlled. It must be borne in mind that the testator in this case was a half blood citizen of the Choctaw nation, that the lands sought to be devised consisted of her homestead and 10 acres of her surplus, allotted to her by reason of her citizenship in the Choctaw Nation, that this property was worth several thousand dollars; and that all of her property except the sum of \$5.00 was bequeathed to persons other than her husband.

The plaintiff, W. R. Wallace, claimed a one-third interest in the lands, so devised, through mesne conveyances passing the interest of David H. Poff, husband of the said testatrix, Patsy Poff. The defendants contend that section 23 of the act of congress of April 26, 1906, gave the allottee power to dispose of her property by will free from any limitation imposed by the statutes of the State of Oklahoma. Said section 23 is:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his real estate and personal property and all interest therein, provided that no will of a fullblood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse or child of such fullblood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner."

[fol. 73] Said section was modified by the act of May 27, 1908, by adding at the conclusion thereof, "Or a judge of a county court of the State of Oklahoma." The said statute which the trial court held was controlling is section 11224, Compiled Statutes of Oklahoma of 1921 (Sec. 8341 R. L. Okla. 1910) which section provides:

"Every estate and interest in real or personal property to which heirs, husband, widow or next of kin might succeed, may be disposed of by will: Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath more than two-thirds of his property away from his wife, nor shall any woman while married bequeath more than two-thirds of her property away from her husband; Provided further, that no person who is prevented by law from alienating conveying or incumbering real property while living shall be allowed to bequeath same by will."

The defendants rely for reversal of this cause on their contention that the said section 23 of the act of congress gives the allottee to whom said act referred the right and power to devise and bequeath all of his property, and that a limitation cannot be placed upon said right by the said section of the state statute; that said sections cannot be construed together; that they are in conflict, and that congress had the power to regulate the disposition of allotments of

citizens of the Five Civilized Tribes. If these statutes are in conflict, then of course the act of congress must prevail, and the judgment of the trial court be reversed.

In determining whether or not they are in conflict, the question is, what was the intent and purpose of congress in passing said section 23? Did it give a right to the Indian, or merely remove a restriction existing? To determine this intent, we must necessarily look to the conditions as to which congress was legislating, and take into consideration its various acts in pari materia. In looking to the different acts of congress, we do not feel that it is necessary to quote at [fol. 74] length therefrom, or to refer in detail to the different provisions of the numerous acts from 1893 down to 1908, touching the allotments of the lands theretofore held in common by the citizenship of these several tribes known as the Five Civilized Tribes, and constituting the bulk of that part of Oklahoma which prior to its admission as a state, on November 16, 1907, was the Indian Territory. The various acts and treaties set forth in detail the purpose and object of congress was to divest the tribes of their interest in the lands owned by them, and to vest the same in the citizens legally entitled to enrollment, each of the acts carrying with it an inhibition against alienation by the Indian citizens of the lands so received, in the exercise of the plenary power of the congress of the United States, as guardian of the Indians, and the properties owned by them. The act of congress of July 1, 1902, known as the Supplemental Agreement with the Choctaws and the Chickasaws, out of which the title to the land involved in this controversy arose, provided for the allotment to each citizen of the tribe, a certain amount of land, the acreage thereof to be determined by the character of the land, as disclosed by an appraisement thereof long theretofore made under the supervision of the Government of the United States. The said allotment act specifically provided that a certain portion of the lands to which each citizen was entitled should be known as surplus, and a certain portion homestead. These different designations were useful in the scheme of allotment only insofar as congress put different restrictions and limitations upon the one to the other. Those lands allotted as surplus were made alienable within a certain period of time, while the lands allotted as homestead were not alienable except under certain other conditions expressed in the acts. None of the lands could be disposed of by will until Congress authorized the [fol. 75] same. This authority to dispose of land by will was in the nature of a removal of restrictions theretofore existing against alienation, and not in its nature conferring a right. The said section 23 was the first removal of congress of the restriction theretofore existing against alienation by will in the Choctaw and Chickasaw Nation.

The act of congress of May 2, 1890 extended in force in Indian Territory of which the Choctaw Nation was a part. Chapter 155 of Mansfield's Digest on "Wills and Testaments" Section 2 of the Act of April 28, 1904 (33 Stat. 573) made all the laws of Arkansas theretofore put in force in the Indian Territory, applicable to Indians and their property, where not inconsistent with acts of con-

gress governing the same. One section of said chapter 155 of said Mansfield's Digest on wills and Testaments being section 6500, provided:

"When any person shall make his last will and testament and omit to mention the name of a child, if living, or the legal representatives of such children born and living at the time of the execution of such will, every such person so far as regards such children, shall be deemed to have died intestate, and such children shall be entitled to such proportion, share and divided of the estate, real and personal, of the testator, as if he had died intestate, and such children shall be entitled to recover from the devisees and legatees in proportion to the amount of their respective shares, and the court exercising probate jurisdiction shall have power to decree a distribution of such estate according to the provisions of this and the preceding sections."

In the Creek Nation the act of Congress of June 30 1902 (32 Stat. 503) the same being a part of the Supplemental Creek Agreement, provided:

"The homestead of each citizen shall remain after the death of the allottee for the use of children born to him after May 25, 1901, but [fol. 76] if he have no such issue, then he may dispose of his homestead by will, free from the limitation herein imposed. * * *"

In the case of *In re Brown's Estate, or Lynde-Bowman-Darby Co. vs. Brown* (Okla.) 97 Pac. 613, this court had under consideration the question as to whether the said limitation of the said chapter 155 Mansfield's Digest on Wills and Testaments hereinabove quoted worked a limitation upon the right of a person who fell within the conditions of the said act of congress giving the right to dispose of the homestead part of the allotment by will. After quoting said provision of Mansfield's Digest and the said provision of the Creek Treaty of 1902, this court said:

"If the laws of Arkansas governing wills and testaments, * * * were not in force in the Creek Nation at the time of descent cast in this case, then there were no written laws governing these subjects, and the Act of Congress of May 2, 1890 supra being in force, chapter 155 supra * * * would be abortive. Such was not the intention of Congress, and the courts heretofore construing these laws have not so construed them. * * * As in this case there were no children born to the devisee. After May 25, 1901 there was no reason why she should not dispose of the land embraced in her homestead by will, but in doing so, it was incumbent upon her to make provision therein for any surviving children born prior to the 25th day of May, 1901. Failing to do so, she must be deemed to have died intestate, and such surviving child is entitled to such a proportion, share and dividend, real and personal, of the estate, as if no will had been made. To determine such share, resort must again be had to the laws of Arkansas * * *."

In the syllabus in said case, the court said:

"There being no children born to a citizen Creek allottee after the 25th day of May, 1901, she was entitled to dispose of her home-
[fol. 77] stead by will, and such devise was subject to the limitations contained in section 6500 of Mansfield's Digest, which reads: 'When any person shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share and dividend of the estate, real and personal, of the testator as if he had died intestate; and such child shall be entitled to recover from the devisees and legatees in proportion to the amount of their respective shares, and the court exercising probate jurisdiction shall have power to decree a distribution of such estate according to the provisions of this and the preceding sections.'"

Thus the court held that although the act of congress known as the Supplemental Creek Treaty expressly authorized citizens under the condition that no child was born after May 25, 1901, and living, to dispose of the homestead by will, that the Arkansas statute placing a limitation thereon was applicable to the Indian citizen. (See also Taylor vs. Parker (Okla.) 125 Pac., 573, 59 L. Ed., 121.)

The said authorities drive us to the conclusion that as long as the statutes of Arkansas placed in force in the Indian Territory on wills and testaments remain the law of that jurisdiction, that whenever property belonging to an Indian citizen by reason of his allotment was alienable by will, the disposition thereof by the Indian citizen by his last will and testament was in accordance with the provisions of Mansfield's Digest, and the limitations contained therein.

In the case of Jefferson v. Fink, 217 U. S. 288, in referring to the various acts of congress touching the allotment of lands in the Five Civilized Tribes, the Supreme Court, among other things, said:

[fol. 78] "Congress was then contemplating the early inclusion of that territory in the new state, and the purpose of those acts was to provide for the time being a body of laws adapted to the needs of the locality and its people, in respect to matters of local or domestic concern. There being no local legislature, congress alone could act. Plainly its action was intended to be merely provisional. By the Enabling Act of June 16, 1906 (34 Stat. 267) provision was made for admitting into the Union both the territory of Oklahoma and the Indian Territory as the State of Oklahoma. Each territory had a distinct body of local laws. Those in the Indian Territory, as we have seen, had been put in force there by Congress. Those in the Territory of Oklahoma had been enacted by the Territorial Legislature. Deeming it better that the new state should come into the Union with a body of laws applying with practical uniformity throughout the state, Congress provided in the Enabling Act, (See, 13) that 'the laws in force in the territory of Oklahoma, as far as applicable, shall extend over and apply to said state until changed by the legislature'

thereof,' and also Sec. 21) that 'all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the constitution of the state.' The people of the state, taking the same view, provided in their constitution (Art. 25 Sec. 2) that 'all laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law.'

"The state was admitted into the Union November 16, 1907; and thereupon the laws of the Territory of Oklahoma relating to descent [fol. 79] and distribution (Rev. Stat. Okla. 1903, c. 86, Art. 4) became laws of the state. Thereafter Congress, by Act of May 27, 1908, c. 199, 35 Stat. 312, Sec. 9, recognized and treated 'the laws of descent and distribution of the State of Oklahoma' as applicable to the lands allotted to members of the Five Civilized Tribes."

The effect of the Enabling Act and the Schedule to the Oklahoma Constitution as touching wills and testaments was merely to substitute the Oklahoma territorial statutes for the laws then in force in the Indian Territory. The policy of Congress at all times touching Indian affairs was to place the Indian as far as practicable and beneficial to the Indian, on the same footing as other citizens of the community or state in which the Indian resides, and this construction will be given to the acts of Congress unless the contrary intention appears. In making the allotments to the citizens of the Five Civilized Tribes, different restrictions and provisions governed the surplus, homestead and inherited lands. In enacting section 23, which had for its purpose a further removal of restrictions, Congress was not unmindful of the fact of those varying legal provisions as affecting the real estate held by the Indians, and by the use of the language of section 23, undertook to make it clear that the Indian citizen could dispose by will of all of his property, and not that arising from some particular source. In other words, Congress merely authorized the Indian to dispose of his estate on the same footing as any other citizen, with the limitation contained in the proviso thereto. There is nothing in the language of section 23 which, if the will had been made, and testator died after said act and before statehood, would not have made the same subject to the provision of the Arkansas statute [fols. 80-93] in force in the Indian Territory, as held to be applicable in the cases above set out. The Oklahoma statute being merely a substitution for the Arkansas law, there is no potent reason advanced, and we think none exists, why the limitations imposed by the Oklahoma Statute above quoted, should not prevent an Indian from disposing of his property by will, to the exclusion of the husband or the wife.

The case cited by plaintiff in error, *Blanet v. Cardin et al.*, 261 Fed. 309, construed an act of Congress touching the alienation by will of allotments held under trust or patent, by the Government for the benefit of certain Quapaw Indians, which act of Congress gave the

Secretary of the Interior complete power to approve or disapprove such will. We do not think that under the facts recited in that case, that the reasoning has any application to the question now before this court for determination.

For the reasons given, the judgment of the district court of Garvin County should be affirmed.

Johnson, C. J., Harrison, Kane, Nicholson, Kennamer, and McNeill, JJ., concur.

Cochran, J., dissents.

[fol. 94] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PRINTED RECORD—Filed February 18, 1924

It is hereby agreed and stipulated by and between counsel for appellants, and counsel for appellee, that the only record necessary to be printed, indexed and filed, and distributed in this cause to determine the issues involved herein are the following instruments, to-wit:

Plaintiff's petition and exhibits attached thereto, appearing at pages 2 to 13 inclusive of case made.

Separate answer of Patsy Blundell, page 21 case made.

Separate answer of Jaunita Blundell and Oleta Blundell, minors, case made, pages 22 to 26 inclusive.

Separate answer of defendant, James H. Blundell, executor of the last will and testament of Patsy Paff, deceased, record pages 27 and 28.

Agreed statement of facts, on which said cause was tried, pages 32¹/₂ and 32³/₄ of the case made filed in the Supreme Court of Oklahoma.

Judgment of the District Court of Garvin County, Oklahoma, as shown by case made, pages 34 to 39 inclusive.

Petition in error.

Opinion of the Supreme Court of the State of Oklahoma.

Petition for writ of error to U. S. Supreme Court.

Writ of error.

Assignments of error.

Dated this the 5th day of February, 1924.

Reford Bond, Alger Melton, Adrian Melton, Counsel for Above-named Appellants. Cicero I. Murray (Lindsay, Okla.), Counsel for Above-named Appellee.

[fol. 95] [File endorsement omitted.]

Endorsed on cover: File No. 30,098. Oklahoma Supreme Court. Term No. 788. James H. Blundell, executor of the last will and testament of Patsy Paff, deceased; Jaunita Blundell, Oleta Blundell, et al., etc., plaintiffs in error, vs. William R. Wallace. Filed February 2, 1924. File No. 30,098.